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No. 92-566

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARK BARNES,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION, WESTINGHOUSE ELECTRIC SUPPLY COMPANY and/or WESCO DALLAS and/or WESCO, a division of or wholly-owned subsidiary of WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONER

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Nothing in respondents' brief in opposition offers a convincing reason why this Court should decline review of an important issue on which the federal courts are deeply divided. They contend that the Fifth Circuit's ruling—treating the one-year bar to removal of diversity cases as waived thirty days after removal—is right on the merits. But the primary basis for this argument is certain implications derived from a law professor's "commentary" on section 1447(c) printed in the United States Code Annotated. Contrary to respondents' suggestion, Br. at 8, there is nothing "official" about this commentary, unless the West Publishing Company has now become the repository of authority to promulgate official statutory

interpretations. *See* United States Code Annotated, volume covering 28 U.S.C.A. §§ 1446-1650, at iv (West Supp. 1992) (describing "practice commentaries"). In any event, respondents do not and cannot contend that this commentary directly addresses the issue presented here.

Respondents also suggest that Congress implicitly relied on parallel treatment of the requirement that all removal petitions be filed within thirty days (which is waivable) and the new provision barring removal of diversity cases that have been pending for a year. Br. at 9-10. *See* 28 U.S.C. § 1446(b). But, as we have stated, Pet. 11 n.6, this argument ignores Congress's choice of entirely different, prohibitory language for the one-year rule. It also ignores Congress's decision in section 1447(c) to limit the thirty-day filing requirement for remand motions to "defect[s] in removal *procedure*." (Emphasis supplied.) Where, as here, defendants remove diversity cases as soon as they are able to do so (but one year has passed since the case was filed), there is nothing procedurally deficient in their removal requests. The cases simply fall outside the class of cases where removal is allowed. *See Brock v. Syntex Lab., Inc.*, 791 F. Supp. 721, 722-23 (E.D. Tenn. 1992) (statute imposes a "blanket prohibition on removal of diversity cases more than one year after commencement"). *Cf. Ostrowitz v. Eli D. Albert, P.C.*, 1991 U.S. Dist. LEXIS 15470, *3 (S.D.N.Y. Oct. 30, 1991) (removal by defendant who is resident of forum state "is surely more than a defect in procedure: 28 U.S.C. § 1441(b) represents a Congressional determination as to what cases may, and may not, be removed").[1]

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[1] Respondents' discussion of the merits of the second question presented is equally unpersuasive. Petitioner contends that there was no waiver under section 1447(c) where he presented the district court with a timely remand motion that pointed out the factual basis for a remand in light of the one-year bar. The removal statutes *require* the district court to "examine the [removal] petition promptly" and order remand summarily where removal was not

In addition to arguing the merits, respondents attempt to minimize the conflict over this issue. But the fact remains that six courts outside the Fifth Circuit, faced with arguments identical to respondents', have refused to find a waiver.[2] One of those courts expressly rejected reliance on the Fifth Circuit's general rule. *Id.* at *2-*3.[3] Four other courts, applying other comparable statutory limitations on removal, have also taken positions inconsistent with the Fifth Circuit. Finally, both the Third Circuit in *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir.), *cert. denied*, 112 S. Ct. 302 (1991), and the Eighth Circuit in *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497 (8th Cir. 1992), have disagreed with the Fifth Circuit by ruling that some nonjurisdictional barriers to removal are not covered by the thirty-day filing requirement in section 1447(c).

Respondents argue that the Fifth Circuit's rule draws a clear line and that any other rule would create confusion. But there is nothing inherently confusing about the approach adopted by the majority of lower federal courts. That approach merely requires courts to differentiate between the procedural obligations of removing defendants and the statutory prohibitions on removal of categories of cases. Moreover, as *Foster* and *Melahn* illu-

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appropriate. 28 U.S.C. § 1446(c)(4). In light of this requirement, it is fair to conclude that petitioner sufficiently preserved his rights by presenting facts (if not legal arguments) supporting a remand under the revised section 1446(b).

[2] Respondents find implicit support in the Eleventh Circuit's decision in *Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989). That case did not, however, address the issue presented here. The sole issue in the case was whether the new one-year bar to removal of diversity cases should be applied retroactively to cases removed prior to its enactment.

[3] As we have explained, Pet. 18-19, remand orders inconsistent with the Fifth Circuit's rule are non-appealable. For this and other reasons, *see id.*, a *circuit* conflict is unlikely to arise for quite some time.

strate, the clarity of the Fifth Circuit's rule is only achieved at a high cost: the rule requires courts to treat as "defect[s] in removal procedure" various nonjurisdictional issues (like forum-selection clauses or abstention) that Congress plainly did not have in mind.

The brief in opposition also argues that petitioner should be denied review because he has already lost on the merits. Br. 17-19. But this will almost always be true in any case where there is an appeal from a district court order denying a remand motion. Such a ruling, after all, cannot be appealed until there has been a final judgment (or some other appealable order). *See* Pet. 6 n.2. Thus, the same situation will likely exist when some future petitioner asks this Court to review the issue presented here. In any event, petitioner plainly has a well-founded basis for believing that the Texas state courts would agree that the federal courts misapplied Texas law in this case. *See* Pet. App. 7a-10a (distinguishing relevant case law).

Respectfully submitted,

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